SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1847

BANGOR AND AROOSTOOK RAILROAD COMPANY, et al.,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, et al.,
Respondents.

BRIEF IN OPPOSITION FOR RESPONDENTS MAINE CENTRAL RAILROAD COMPANY AND THE TRUSTEES OF THE BOSTON & MAINE CORPORATION, DEBTOR

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
QUESTIONS PRESENTED	2
STATEMENT	
A. Factual Background	3
B. Proceedings Before the Interstate Commerce Commission	6
C. Proceedings Before the Court of Appeals	7
REASONS FOR DENYING THE WRIT	9
The First Amendment Issues	9
The Construction of Section 3(4)	13
The Damages and Statute of Limitations Issues	15
CONCLUSION	19

TABLE OF CASES

CITATIONS:

American Column & Lumber Co. v. *United States*, 257 U.S. 377 (1921)	11
American Pipe and Construction Co. v. *Utah*, 414 U.S. 538 (1974)	17
Bailey v. *Glover*, 88 U.S. (21 Wall.) 342 (1875)	17
Bates v. *State Bar*, 433 U.S. 350 (1977)	13
Bigelow v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946)	16
Bigelow v. *Virginia*, 421 U.S. 809 (1975)	13
Consolo v. *FMC*, 383 U.S. 607 (1966)	18
Cook v. *Avien, Inc.*, Civil No. 77-1106 (1st Cir., filed March 28, 1978)	18
FPC v. *Colorado Interstate Gas Co.*, 348 U.S. 492 (1955)	10
Giboney v. *Empire Storage & Ice Co.*, 336 U.S. 490 (1949)	11

Page

Holmberg v. *Armbrecht*, 327 U.S. 392 (1946) 17
Hormel v. *Helvering*, 312 U.S. 552 (1941) 10
In Re Primus, —— U.S. —— (No. 77-56, decided May 30, 1978) 11
Japanese War Notes Claimants Ass'n of the Philippines, Inc. v. *United States*, 373 F.2d 356 (Ct. Cl.), *cert. denied*, 389 U.S. 971 (1967) 18
Klein v. *Bower*, 421 F.2d 338 (2d Cir. 1970) 18
Linmark Associates v. *Township of Willingboro*, 431 U.S. 85 (1977) 13
Mills v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970) .. 11
Moviecolor Ltd. v. *Eastman Kodak Co.*, 288 F.2d 80 (2d Cir. 1961) 18
NLRB v. *Gissel Packing Co.*, 395 U.S. 575 (1969) .. 11, 13
Ohralik v. *Ohio State Bar Assn.*, —— U.S. —— (No. 76-1650, decided May 30, 1978) 9, 11
Paris Adult Theatre I v. *Slaton*, 413 U.S. 49 (1973) ... 11
Prather v. *Neva Paperbacks, Inc.*, 446 F.2d 338 (5th Cir. 1971) 18
SEC v. *Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968), *cert. denied sub nom., Coates* v. *SEC*, 394 U.S. 976 (1969) 11
Southern Pacific Co. v. *United States*, 277 F. Supp. 671 (D. Neb. 1967) (three-judge court), *aff'd per curiam*, 390 U.S. 744 (1968) 9, 14, 15
Story Parchment Co. v. *Paterson Parchment Paper Co.*, 282 U.S. 555 (1931) 16
United States v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33 (1952) 10
Virginia State Board of Pharmacy v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) 13
Western Pacific Railroad v. *United States*, 382 U.S. 237 (1965) 14

CONSTITUTIONAL PROVISIONS:

United States Constitution, First Amendment .... *passim*

STATUTES:

49 U.S.C. § 3(4) ..... *passim*
§ 15(10) 15
§ 16(3)(b) 7, 17

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BRIEF IN OPPOSITION FOR RESPONDENTS MAINE CENTRAL RAILROAD COMPANY AND THE TRUSTEES OF THE BOSTON & MAINE CORPORATION, DEBTOR

Respondents Maine Central Railroad Company ("MEC") and Robert W. Meserve and Benjamin H. Lacy, Trustees of the Property of the Boston & Maine Corporation, Debtor, ("B&M") file this brief in opposition to the petition for a writ of certiorari by which Bangor & Aroostook Railroad Company ("BAR") and Canadian Pacific Limited ("CP Rail") seek review of the judgment of the United States Court of Appeals for the First Circuit entered on March 30, 1978, which the court below reaffirmed by denial of a petition for rehearing on May 12, 1978.

OPINIONS BELOW

The opinion of the court of appeals is reported at 574 F.2d 1096. The order of the Interstate Commerce Commission is reported at 356 I.C.C. 349. The court's further opinion denying BAR's petition for rehearing has not been reported.

QUESTIONS PRESENTED

1. Whether the First Amendment forbids governmental regulation of commercial solicitation, consisting of communications to shippers that are "at least misleading" (App. A-17),[1] through which a railroad implements a policy of discriminating among its connecting lines in the distribution of freight traffic.

2. Whether the Interstate Commerce Commission may invoke 49 U.S.C. § 3(4), which provides that railroads must not "unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper," to forbid misleading commercial solicitation through which a railroad implements a policy of discriminating among its connecting lines in the distribution of freight traffic.

3. Whether there is substantial evidence to support the Interstate Commerce Commission's findings (a) concerning the amount of damages suffered by MEC and B&M and (b) that petitioners' fraudulent concealment of pertinent facts tolled the applicable statute of limitations.

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[1] Citations to "(App. A-__)" are to the appendix accompanying the petition. Citations to "(R.__)" are to the record lodged with the court below.

STATEMENT

A. Factual Background.

This case arises from petitioners' attempt, in the words of the Interstate Commerce Commission, "to carve up the transportation market between themselves without regard to the service characteristics . . . of another similarly situated connecting line" (App. A-76) by means of "a reciprocal sponsorship of each other's routes in a team sales effort to induce shippers to use their combined routes to the exclusion of other carriers." (App. A-78.)

BAR is a rail carrier whose principal lines run on an axis from Bangor, Maine, in the south to Madawaska at the far northern tip of the State. BAR interchanges traffic with two carriers whose roads, running east to west, cross its lines. At Northern Maine Junction, just west of Bangor, BAR connects with MEC; about 45 miles to the north, at Brownville Junction, Maine, BAR connects with CP Rail. Traffic originating or terminating on BAR may thus be routed via CP Rail and its connections or MEC and its connections, which include B&M. MEC and CP Rail routes were substantially equal in their service characteristics during the period relevant to this case. (App. A-20; *see also,* App. A-11-12, 57, 77.)

In late 1969 BAR proposed to CP Rail that the two carriers enter into an agreement calling for BAR to route 24,000 additional carloads of freight traffic annually via CP Rail—the total number of carloads of traffic originating and terminating on BAR that BAR believed could be diverted away from MEC

routes and to CP Rail routes.[2] After extended negotiations, BAR and CP Rail entered into a "private" written agreement, calling upon BAR to "interline" the full 24,000 additional carloads of traffic with CP Rail each year for 15 years. (The full text of the agreement appears at App. A-112-115.) In signing the agreement, the parties understood that they were committing themselves "vigorously to solicit traffic on behalf of CP." (App. A-7.) Internal BAR studies forecast that such a solicitation campaign would reduce the annual revenues of MEC and B&M by $2.8 million each. (App. A-5.)

Upon reaching agreement on the terms of "car allowances" that CP Rail would pay BAR for "additional" paper and potato traffic, BAR and CP Rail embarked on an extensive and vigorous campaign to "divert 'as much traffic as possible' from MEC and B&M onto . . . CP." (App. A-4; *see also* App. A-78.) Solicitation of shippers was the heart of the campaign; BAR and CP Rail traffic solicitors, often working together, visited shippers and urged them to route their traffic via CP Rail.[3] Though they frequently touted service considerations as reasons for favoring CP Rail routes, the solicitors had no factual basis to support their recommendations. (App. A-7, 11.) BAR has failed throughout these proceedings

[2] Before 1970, approximately 80 percent of all freight traffic originating or terminating on BAR traveled via MEC routes. In those years, BAR did not preferentially solicit shippers for any particular route; BAR's president testified that the solicitation condemned by the Commission "was something entirely new . . . we had never done any soliciting." (R. 1810.)

[3] The Commission found that some shippers were unaware that they could route their traffic by alternative routes. (App. A-78.)

to demonstrate a single instance in which its "recommendations to shippers were individually tailored according to service considerations." (App. A-12.)[4]

An exchange of correspondence between the chief traffic solicitors of BAR and CP Rail, which is quoted at some length in the Commission's order, confirms the policy that underlay petitioners' efforts to divert traffic. In response to complaints by BAR's solicitor that CP Rail service was deteriorating, CP Rail's solicitor acknowledged that carrier's "well known service deficiencies" but added:

> "[M]y job, and the jobs of those under my jurisdiction, consists of getting all possible traffic to move via Brownville Junction and the BAR. Service, equipment, politics, and any other considerations notwithstanding, the intention of Senior Officials of CP Rail is that we bend every effort in this direction. I have also been told by my superiors that similar instructions have been given to BAR personnel, by Senior Officers of that Company." (App. A-66.)

[4] The Commission described instances in which petitioners intentionally misrepresented the relevant service facts in order to secure CP Rail routings. (App. A-65.) Moreover, the campaign to divert traffic was not limited to face-to-face solicitation. BAR distributed "routing guides" to shippers on its lines that identified CP Rail routes to hundreds of destinations, but not the competing MEC-B&M routes to those same destinations. (App. A-7, 77.) BAR provided CP Rail with a detailed, computerized list of shippers and receivers of freight originated and terminated on BAR lines to assist CP Rail's solicitation efforts (App. A-77); BAR has never provided such information to any other carrier and the information was essential to CP Rail's solicitation efforts. (App. A-59, 77.) BAR was also able to induce shippers on its lines to route via CP Rail instead of MEC-B&M routes by manipulating the supply of boxcars provided to the shippers. (App. A-64.)

BAR's chief solicitor replied that BAR's "intentions were to route every possible BAR origination and termination via Brownville Junction, and that it and CP were working for the same goal . . ." (*Id.*)

Coinciding with the start of the diversion campaign in mid-1970 was a sharp drop in the traffic interchanged between MEC and BAR. In consequence, B&M and MEC interchanged less traffic originated and terminated on BAR. B&M and MEC attempted to ascertain the reasons for the decline in their handling of traffic originated on or destined for BAR, but BAR and CP Rail concealed and misrepresented the terms of their agreement, failed to file a copy with the Interstate Commerce Commission as they were required to do, assured MEC that BAR's policy against preferential solicitation would remain unchanged, and disguised the payment of "car allowances" on "additional" traffic as freight damage claim payments. In December 1973, the Commission initiated an investigation into BAR's interchange practices with CP Rail; shortly thereafter, MEC and B&M filed their complaints with the Commission alleging BAR's violations of Section 3(4) of the Interstate Commerce Act (the "Act"), 49 U.S.C. § 3(4), seeking damages sustained in consequence of the violation.

B. Proceedings Before the Interstate Commerce Commission.

After hearings, an ICC administrative law judge entered an initial decision in July 1976 holding that BAR, aided and abetted by CP Rail, had violated Section 3(4) of the Act. Finding that MEC and B&M, connecting carriers of BAR, had been "unduly prejudiced in the distribution of traffic not specifically routed by the shipper" during the period 1970-74,

the law judge awarded compensatory damages of approximately $1.6 million to MEC and $690,000 to B&M.

BAR and CP Rail filed exceptions with the Commission. In February 1977 the full Commission unanimously reaffirmed the administrative law judge's conclusion of law, and supporting findings of fact, that BAR had unduly prejudiced MEC and B&M in violation of Section 3(4), with the assistance of CP Rail. The Commission concluded that the statute of limitations had been tolled by petitioners' fraudulent concealment of pertinent facts. The Commission also entered an order directing BAR and CP Rail to cease and desist from conduct violating Section 3(4).[5]

C. Proceedings Before the Court of Appeals.

BAR filed a petition for review of the Commission's order with the court below, challenging the Commission's findings and conclusions both as to BAR's violation of Section 3(4) and the damages the Commission awarded. Although no party had raised any First Amendment issue in the proceedings before the Commission, BAR's principal argument in the court of appeals assailed the Commission's order as an infringement of BAR's freedom of commercial speech.[6]

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[5] The Commission reduced the amount of damages awarded to MEC and B&M to $176,323 and $86,917, respectively.

[6] MEC, B&M and CP Rail intervened in the proceedings. In addition, MEC and B&M filed petitions for review in the court below challenging the adequacy of the Commission's award of damages; BAR intervened in each case. The court of appeals consolidated the cases for oral argument and decision.

Save for the portion directing BAR and CP Rail to refrain from future violations of Section 3(4), the court below affirmed the Commission's order in all respects. With "little hesitancy in upholding the Commission on the facts of this case" (App. A-12), which disclosed "'hard core' conduct" (App. A-13 n.10, 35) in violation of the Act, the court found that substantial evidence supported the Commission's findings that petitioners' concerted solicitation campaign consisted of communications that "were at least misleading" (App. A-17), and that BAR "exerts substantial influence over shippers' choice of routes, regardless of a shipper's experience or sophistication." (App. A-16.) The court of appeals concluded that the facts fully supported the Commission's conclusion of law that BAR's conduct amounted to discrimination in the distribution of traffic among similarly situated connecting lines, in violation of Section 3(4). (*Id.*)

Rejecting BAR's newly-discovered First Amendment arguments, the court noted that "[*p*]*ost hoc* characterization of these activities as salutary promotion of competition through fair-minded recommendations to strong and sophisticated shippers is implausible." (App. A-12.)

The court of appeals vacated the Commission's cease and desist order, however, and remanded the case to the Commission for further proceedings. While the "hard-core" conduct disclosed by the record was, in the court's view, undoubtedly a past violation of Section 3(4) (App. A-35), the court held that an order governing future conduct of the petitioners should admit of no uncertainty. (*Id.*) On

May 12, 1978, the court below denied BAR's petition for rehearing concerning the application of the statute of limitations.

REASONS FOR DENYING THE WRIT

The petition raises no issues warranting this Court's review of the judgment below. The court of appeals rejected petitioners' First Amendment arguments with an analysis that is consistent in all respects with the line of "commercial speech" cases, culminating in the opinion in *Ohralik* v. *Ohio State Bar Ass'n*, ___ U.S. ___ (No. 76-1650, decided May 30, 1978), recently decided by this Court. The interpretation of Section 3(4) embraced by the Commission and affirmed by the court of appeals conflicts with no other decision, finds strong support in the facts of record and follows precisely in the footsteps of a strikingly similar case interpreting Section 3(4), which this Court summarily affirmed.[7] Finally, petitioners' challenges to the Commission's award of damages and findings as to tolling of the statute of limitations by fraudulent concealment are in substance little more than disagreement with the court of appeals' findings that the Commission's determinations were supported by substantial evidence in the record.

The First Amendment Issues.

If petitioners' First Amendment arguments are not barred at the threshold for failure to raise them be-

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[7] Southern Pacific Co. v. United States, 277 F. Supp. 671 (D. Neb. 1967) (three-judge court), *aff'd per curiam*, 390 U.S. 744 (1968).

fore the Commission,[8] they are plainly foreclosed by this Court's recent "commercial speech" decisions, which confirm the correctness of the opinion below.

1. The court of appeals based its rejection of petitioners' First Amendment contentions on two independent grounds. *First,* it held that freedom of speech does not enjoy the same protection in commercial contexts as it does in other contexts; the court pointed out that "exchange of information can be a vital element in an illegal scheme" in a number of areas of "extensive economic supervision, such as the securities, antitrust and transportation fields . . ." (App. A-17.) It found petitioners' campaign to divert traffic to be such an "illegal scheme." In these observations, the opinion of the court below was squarely in accord with the decisions of this Court. Several weeks after the court below denied BAR's petition for rehearing, this Court stated the same principles in strikingly similar terms:

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[8] As petitioners recognize (Pet. 16 n.7), failure to raise issues during Interstate Commerce Commission proceedings ordinarily precludes a party from raising such issues on judicial review. United States v. L. A. Tucker Truck Lines, Inc., 344 U.S. 33 (1952); *see also* FPC v. Colorado Interstate Gas Co., 348 U.S. 492 (1955). Petitioners do not advance exceptional circumstances justifying waiver of the rule, Hormel v. Helvering, 312 U.S. 552 (1941), and the explanation of their failure to raise such issues acknowledges that they could "theoretically" have raised such issues before the Commission in their exceptions to the administrative law judge's initial decision. (Pet. 16-17 n.7.) (Petitioners do not explain why they did not petition the Commission for rehearing or reopening.)

Finally, petitioners' assertion that "no prejudice" could result by belated consideration of such issues (*id.*) ignores that the Commision, MEC and B&M have already spent nearly five years litigating this case.

> " '[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.' *Giboney* v. *Empire Storage & Ice Co.,* 336 U.S. 490, 502 (1949). Numerous examples could be cited of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, *SEC* v. *Texas Gulf Sulphur Co.,* 401 F.2d 833 (CA2, 1968). *cert. denied,* 394 U.S. 976 (1969), corporate proxy statements, *Mills* v. *Electric Auto-Lite Co.,* 396 U.S. 375 (1970), the exchange of price and production information among competitors, *American Column & Lumber Co.* v. *United States,* 257 U.S. 377 (1921), and employers' threats of retaliation for the labor activities of employees, *NLRB* v. *Gissel Packing Co.,* 395 U.S. 575, 618 (1969). *See Paris Adult Theatre I* v. *Slaton,* 413 U.S. 49, 61-62 (1973). Each of these examples illustrates that the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." *Ohralik* v. *Ohio State Bar Ass'n, supra,* slip op. at 8-9.

BAR's desire to distribute traffic among its connecting lines on a preferential basis, like a lawyer's interest in employment, "is a subject only marginally affected with First Amendment concerns" and "falls within the State's proper sphere of economic . . . regulation." *Id.,* at 12; *cf. In Re Primus,* ___ U.S. ___ (No. 77-56, decided May 30, 1978).

2. The *second* ground on which the court below rejected petitioners' First Amendment arguments was that petitioners did not limit their communications with shippers to truthful, carefully ascertained infor-

mation concerning available routes, but engaged in active advocacy of the benefits of CP Rail routes when all available evidence indicated that CP Rail routes were not superior to MEC-B&M routes. In that sense, the solicitation was "at least misleading" (App. A-17); its impact on MEC and B&M was pernicious because it was conducted by "an originating carrier such as BAR" that "exerts substantial influence over shippers' choice of routes . . ." (App. A-16.)*

On this ground, too, the opinion of the court below accords with the decisions of this Court. Just as a lawyer's "in-person solicitation . . . does not stand on a par with truthful advertising" because of the significant risk that laymen would be misled or unduly influenced, *Ohralik, supra,* slip op. at 7, 9-10, solicitation undertaken by an originating carrier for the purpose of discriminating among connecting lines in the distribution of traffic does not receive the same constitutional protection as truthful advertising of objectively determined facts.

The court below was careful to emphasize that neither its nor the Commission's interpretation of Section 3(4) forbids "an originating carrier from providing information of any and all sorts to shippers on an even-handed basis" so long as the information is accurate and in a factual form not apt to exert pressure on shippers. (App. A-17.) Petitioners were not denied any right to provide shippers with accurate and balanced factual information, which is the right that the "commercial free speech" cases have protected, subject to the limitation that "the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena." *Bates* v. *State Bar,* 433 U.S. 350, 383 (1977); *see also Linmark Associates* v. *Township of Willingboro,* 431 U.S. 85, 98 (1977); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council,* 425 U.S. 748, 770 (1975); *Bigelow* v *Virginia,* 421 U.S. 809, 826 (1976); *NLRB* v. *Gissel Packing Co., supra,* 395 U.S. at 618.

* It borders on the frivolous for petitioners to contend that the record does not support the findings concerning BAR's influence over shippers on its lines. Quite apart from the examples cited by the court of appeals, the Commission described the influence exerted by virtue of BAR's power over shippers' car supplies (App. A-56, 64-65, 77), quoted many statements by BAR representatives concerning BAR's control of shippers' routings (App. A-58, 60-61), and noted the ignorance of shippers concerning availability of alternate routings. (App. A-78.) BAR's vice president testified that shippers rely on the originating carrier to provide routing advice. (R. 1899, 2567-68.)

The Construction of Section 3(4).

3. Petitioners also fail to tender an issue worthy of this Court's review with their contention that Section 3(4) cannot be violated so long as the shipper fills in the routing blank on the waybill and carriers honor that routing. (Pet. 21-27.) Under petitioners' formalistic interpretation of Section 3(4), a carrier may do all within its power to induce shippers to route their traffic in a manner that discriminates among the carrier's connecting lines. It may engage in misleading solicitation, manipulate boxcar supply and provide selective routing information—yet escape the strictures of Section 3(4) because, according to petitioners, the provision literally extends only to "the distribution of traffic that is not specifically routed by the shipper."

The Commission refused to accept an interpretation of Section 3(4) that would so plainly subvert its "procompetitive" policy (App. A-75) by permitting "an originating carrier and one of its connecting lines [to] sit down privately and negotiate agreements to carve up the transportation market between themselves without regard to the service characteristics . . . of another similarly situated connecting line." (App. A-76.) In reaching the conclusion that Section 3(4) bans any conduct by which a carrier seeks "to apportion economic advantage among competitors at a common interchange," *Western Pacific Railroad* v. *United States,* 382 U.S. 237, 244 (1965), the Commission independently appraised the analysis of Section 3(4) undertaken in *Southern Pacific Co.* v. *United States,* 277 F. Supp. 671 (D. Neb. 1967) (three-judge court), *aff'd per curiam,* 390 U.S. 744 (1968), and blessed that analysis as sound transportation policy. (App. A-68-77.)

Petitioners' efforts to distinguish *Southern Pacific* are unavailing. The *Southern Pacific* court held squarely that preferential solicitation that is part of a campaign by which a carrier systematically discriminates among similarly situated connecting lines in the distribution of traffic violates Section 3(4):

> "The Act cannot be circumvented by wrongfully inducing the shipper to commit the discrimination in place of the carrier . . . . [P]referential solicitation when done on a 'preconcerted' and 'systematic' discriminatory basis . . . falls within the statutory prohibition of Section 3(4), as well. The preferential solicitation dictated by the agreement is without concern for competitive benefits of similar lines and without relationship to the best possible service to the shipper. It is as much an apportionment of 'economic advantage' as direct routing itself." 277 F. Supp. at 685.

This Court summarily affirmed *Southern Pacific* on a jurisdictional statement that tendered the same issue of Section 3(4)'s construction. Each tribunal that has considered the question has reached the identical conclusion that Section 3(4), whose purpose is to protect connecting lines from discrimination at the hands of a carrier with power to influence traffic flows, reaches systematic and preconcerted discriminatory solicitation calculated to influence shippers' routing selection and thus "distribute" traffic. (App. A-14-16.) That interpretation does not infringe the right of shippers under 49 U.S.C. § 15(10) to select their own routings (Pet. 23), but ensures that the right will not be diluted by undue carrier influence.

The Damages and Statute of Limitations Issues.

4. Petitioners' murky discussion of the damages awards (Pet. 27-31) poses a false issue in its attempt to characterize the awards as "windfalls." The Commission and the court below applied standard principles in assessing the compensatory damages to be awarded. *First,* the Commission found—in part from the admissions of petitioners' own officers—that MEC and B&M suffered injury in the form of actual diversion of traffic. (App. A-77-78, 20-21.) *Second,* it was determined that the *only* factor that could explain the sharp decline in MEC's and B&M's market share of traffic originated and terminated on BAR

was the illegal diversion. (App. A-20-21.)[10] *Third,* the Commission computed the revenues MEC and B&M would have received had their market share of certain commodities remained unchanged, subtracted the costs that would have been incurred in handling the additional traffic, and thus arrived at damages. (App. A-19.)

While BAR urged below that damages should be calculated by tracing each of the thousands of carloads of traffic alleged to have been diverted during 1970-74, both the Commission and the court of appeals rejected the argument because of the virtual impossibility of the task and because BAR and CP Rail had deliberately destroyed important origin and destination data. (App. A-20.) Because MEC and B&M had demonstrated the fact of injury and shown that only the illegal diversion could account for the decline in their market share, use of the "before-and-after" test was appropriate under traditional principles governing the computation of compensatory damages. (App. A-19-20, *citing Bigelow* v. *RKO Radio Pictures, Inc.,* 327 U.S. 251 (1946); *Story Parchment Co.* v. *Paterson Parchment Paper Co.,* 282 U.S. 555 (1931).) Petitioners' contentions with respect to the computation of damages amount to no more than a challenge to the evidence.

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[10] Petitioners describe the methodology incorrectly when they say that it "included assessments for all additional traffic which shippers routed via CP." (Pet. 27.) In fact, the assessment was computed by analyzing the increase of CP Rail's percentage market share of traffic originated or terminated on BAR that could have been routed either by MEC routes or CP Rail routes. (App. A-18-19.)

5. Similarly, petitioners attempt to phrase as a question of law another issue that depends critically upon the findings of fact made by the Commission and endorsed by the court below: whether MEC and B&M exercised due diligence in their efforts to ascertain whether they had a cause of action against BAR, but were misled by petitioners' evasions and fraudulent concealment of pertinent facts, so that the statute of limitations of 49 U.S.C. § 16(3)(b) was tolled.[11]

Petitioners emphasize that MEC and B&M came to suspect that BAR and CP Rail had undertaken some new policy that involved solicitation and an increase in CP Rail's market share of BAR traffic. But they wholly omit to mention that, in response to numerous requests for information, BAR and CP Rail concealed facts and affirmatively misled MEC and B&M: (1) BAR assured MEC that it had not and would not engage in preferential solicitation (App. A-43); (2) CP Rail advised MEC that it had embarked on a unilateral "sales blitz" involving, at most, a "per diem agreement" (*id.*); (3) BAR and CP Rail officials refused to produce copies of the agreement (App. A-33 n.17) while they orally misrepresented its nature and terms (App. A-42-43); (4) "car allowances" were disguised as freight damage claim payments (App. A-12); and (5) neither BAR nor CP Rail complied with ICC regulations requiring the filing of traffic agreements with the Commission. (App. A-44 n.2.) Under all these circumstances, the

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[11] Petitioners do not contest that a federal statute of limitations may be tolled by fraudulent concealment. Holmberg v. Armbrecht, 327 U.S. 392 (1946); *see also* American Pipe and Construction Co. v. Utah, 414 U.S. 538 (1974); Bailey v. Glover, 88 U.S. (21 Wall.) 342 (1875).

court below found substantial evidence to support the Commission's conclusion that, despite diligent efforts by MEC and B&M to ascertain the nature of the conduct undertaken by BAR and CP Rail, evasions and misrepresentations lulled and misled them. (App. A-44.)

Far from announcing any new or different legal standards, the court below held that, under all the facts and circumstances of record, there was substantial evidence to support the Commission's conclusions that MEC and B&M had exercised due diligence in the assertion of their rights—sufficient evidence " 'to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.' " *Consolo* v. *FMC*, 383 U.S. 607, 620 (1966). Indeed, the cases which petitioners cite [12] turn not on any different legal standard governing the tolling of statutes of limitations, but upon differing assessments of differing factual situations.

[12] Cook v. Avien, Inc., Civil No. 77-1106 (1st Cir., filed March 28, 1978); Prather v. Neva Paperbacks, Inc., 446 F.2d 338 (5th Cir. 1971); Klein v. Bower, 421 F.2d 338 (2d Cir. 1970); Japanese War Notes Claimants Ass'n of the Philippines, Inc. v. United States, 373 F.2d 356 (Ct. Cl.), *cert. denied*, 389 U.S. 971 (1967); Moviecolor Limited v. Eastman Kodak Co., 288 F.2d 80 (2d Cir.), *cert. denied*, 368 U.S. 821 (1961).

CONCLUSION

The writ should be denied.

Respectfully submitted,

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